No. 82-939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERTO REQUENA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether due process was violated when the trial court applied the Illinois Rape Shield statute to exclude questions concerning the rape victim's prior sexual conduct.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTE INVOLVED	3
STATEMENT OF FACTS	3
REASON FOR DENYING THE WRIT:	
APPLICATION OF THE ILLINOIS RAPE SHIELD STATUTE IN THIS CASE WAS NOT VIOLATIVE OF DUE PROCESS SINCE ONLY IRRELEVANT, IMMATERIAL QUESTIONS DESIGNED TO HUMILIATE AND EMBARRASS THE RAPE VICTIM WERE EXCLUDED AT TRIAL	4
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	PAGE(S)
Alford v. United States, 282 U.S. 687 (1931)	8
Davis v. Alaska, 415 U.S. 308 (1974)	5, 6, 8
Kemp v. State, 606 S.W.2d 573 (Ark. 1980)	5
People v. Bachman, 92 Ill. App. 3d 419 (3rd Dist. 1981)	4
People v. Blackburn, 56 Cal. App. 3d 685 (Ct. App. 1976)	5
People v. Bergin, 74 Ill. App. 3d 58 (1st Dist. 1979)	7
People v. Bufford, 110 Ill. App. 3d 46 (1st Dist. 1980)	5
People v. Collins, 25 Ill. 2d 605 (1962), *cert. denied*, 373 U.S. 942 (1963)	7
People v. Cornes, 80 Ill. App. 3d 166 (5th Dist. 1980)	4, 5
People v. Fink, 59 Ill. App. 3d 51 (2d Dist. 1974)	7
People v. Hanks, 17 Ill. App. 3d 633 (1st Dist. 1974)	8
People v. Lewis, 73 Ill. App. 3d 951 (5th Dist. 1979)	7
People v. Mandel, 403 N.Y.S.2d 63 (App. Div. 1978)	5
People v. McKenna, 196 Colo. 367 (1978)	5
People v. Richardson, 32 Ill. 2d 412, *cert. denied*, 384 U.S. 1201 (1965)	7
People v. Siefke, 91 Ill. App. 3d 14 (2nd Dist. 1981)	4, 5
People v. Wells, 102 Mich. App. 558 (1980)	5
Pratt v. Parrah, 615 F.2d 486 (8th Cir.), *cert. denied*, 449 U.S. 852 (1980)	8
Roberts v. State, 268 Ind. 127 (Ct. App. 1978)	5
Rozell v. Estell, 554 F.2d 229 (5th Cir.), *cert. denied*, 434 U.S. 942 (1977)	8

Smith v. Commonwealth, 566 S.W.2d 181 (Ky. App. 1978) 5
State v. Barrington, 31 Or. App. 265 (1977) 5
State v. Blue, 225 Kan. 516 (1979) 5
State v. Fortney, 301 N.C. 31 (1980) 5
State v. Gardner, 59 Ohio St. 2d 14 (1979) 5
State v. Green, 260 S.E.2d 251 (W. Va. 1979) 5
State v. Hamilton, 289 N.W.2d 470 (Minn. 1979) ... 5
State v. Herrera, 92 N.M. 7 (Ct. App. 1978) 5
State v. Higley, 621 P.2d 1043 (Mont. 1980) 5
State v. Howard, 426 A.2d 457 (N.H. 1981) 5
State v. McCoy, 261 S.E.2d 159 (S.C. 1979) 5
State v. Pratt, 197 Neb. 382 (1980) 5
State v. Ryan, 157 N.J. Super. 121 (Super. Ct. App. Div. 1978) 5
United States v. Kasto, 584 F.2d 268 (8th Cir. 1978) 8

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. VI 2
U.S. Const. Amend. XIV 2

STATUTE:

Ill. Rev. Stat. ch. 38, § 115-7(a) (1978) 3, 4

MISCELLANEOUS:

Privacy of Rape Victims: Hearing on H.R. 14666 before the Subcomm. on Criminal Justice of the Committee on the Judiciary, 94th Cong. 2d Sess. at 14-15 (1976) 7, 8

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Petitioner's state court conviction for rape was affirmed by the Appellate Court of Illinois, First District. *People v. Requena*, 105 Ill. App. 3d 831, 435 N.E.2d 125 (1st Dist. 1982). A petition for leave to appeal to the Illinois Supreme Court was denied on October 5, 1982. Copies of both the Appellate Court's opinion and the Illinois Supreme Court's order are attached to the petitioner's brief as appendices.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3). However, as treated more fully below, respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST., Amend. VI provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST., Amend. XIV provides, in pertinent part, that:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Ill. Rev. Stat., ch. 38, § 115-7(a) (1978) provides that:

> In prosecutions for rape or deviate sexual assault, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused.

STATEMENT OF FACTS

The facts relevant to the issue raised by petitioner are adequately set forth in the opinion of the Illinois Appellate Court. *People v. Requena*, 105 Ill. App. 3d 831, 435 N.E.2d 125 (1st Dist. 1982).

REASON FOR DENYING THE WRIT

APPLICATION OF THE ILLINOIS RAPE SHIELD STATUTE IN THIS CASE WAS NOT VIOLATIVE OF DUE PROCESS SINCE ONLY IRRELEVANT, IMMATERIAL QUESTIONS DESIGNED TO HUMILIATE AND EMBARRASS THE RAPE VICTIM WERE EXCLUDED AT TRIAL.

Petitioner seeks this writ of certiorari contending that the Illinois Rape Shield statute deprived him of due process since it precluded cross-examination of the complainant regarding her use of an intrauterine device and her sexual activities, if any, with her boyfriend prior to the alleged rape.[1]

Review of this case is not warranted. The trial court properly applied the rape shield statute excluding only an irrelevant line of questioning designed to harass and humiliate the complainant and direct the attention of the jury to issues not relevant to the controversy. Petitioner was not prevented from introducing relevant evidence, or from challenging the complainant's credibility and veracity, or from otherwise utilizing cross-examination as an effective tool of impeachment.

Illinois Courts have considered and upheld the validity of the rape shield statute on numerous occasions. *See People v. Cornes*, 80 Ill. App. 3d 166, 399 N.E.2d 1346 (5th Dist. 1980); *People v. Bachman*, 92 Ill. App. 3d 419, 414 N.E.2d 1369 (3rd Dist. 1981); *People v. Siefke*, 91 Ill.

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[1] *Ill. Rev. Stat.*, ch. 38, § 115-7(a) (1978), provides that:

> In prosecutions for rape or deviate sexual assault, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused.

App. 3d 14, 422 N.E.2d 1071 (2d Dist. 1981); *People v. Bufford*, 110 Ill. App. 3d 46 (1st Dist. 1980). In *Cornes*, the court stated:

> Complainant's past sexual conduct has no bearing on whether she has consented to sexual relations with the defendant. The legislature recognized this fact and chose to exclude evidence of complainant's reputation for chastity as well as specific acts of sexual conduct with third persons in cases of rape and sexual deviate assault.

People v. Cornes, 80 Ill. App. 3d at 175.[2]

Petitioner cites to *Davis v. Alaska*, 415 U.S. 308 (1974), as controlling. His reliance on *Davis* is misplaced. The defendant in *Davis* was precluded under a state statute preserving the confidentiality of juvenile delinquency adjudications, from impeaching the credibility of a prosecution witness by cross-examination designed to establish possible bias. 415 U.S. at 314. In the

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[2] Forty-five states have recognized this fact and have enacted various forms of rape shield laws. In the following cases state courts have upheld the constitutionality of their rape shield laws: *Kemp v. State*, 606 S.W.2d 573 (Ark. 1980); *People v. Wells*, 102 Mich. App. 558, 302 N.W.2d 232 (1980); *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1980); *State v. Howard*, 426 A.2d 457 (N.H. 1981); *State v. Fortney*, 301 N.C. 31, 269 S.E.2d 110 (1980); *State v. Higley*, 621 P.2d 1043 (Mont. 1980); *State v. Gardner*, 59 Ohio St.2d 14, 391 N.E.2d 337 (1979); *State v. McCoy*, 261 S.E.2d 159 (S.C. 1979); *State v. Hamilton*, 289 N.W.2d 470 (Minn. 1979); *State v. Blue*, 225 Kan. 576, 592 P.2d 897 (1979); *State v. Green*, 260 S.E.2d 251 (W.Va. 1979); *Roberts v. State*, 268 Ind. 127, 373 N.E.2d 1103 (Ct. App. 1978); *State v. Ryan*, 157 N.J. Super 121, 384 A.2d 570 (Super. Ct. App. Div. 1978); *State v. Herrera*, 92 N.M.7, 582 P.2d 384 (Ct. App. 1978); *People v. Mandel*, 403 N.Y.S.2d 63 (App. Div. 1978); *Smith v. Commonwealth*, 566 S.W.2d 181 (Ky. App. 1978); *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978); *State v. Barrington*, 31 Or. App. 265, 570 P.2d 394 (1977); *People v. Blackburn*, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (Ct. App. 1976).

instant case, petitioner was not precluded from using cross-examination to attack the credibility of the complainant or to expose a bias. Nothing of *relevance* was kept from the jury.

Petitioner was permitted to ask the victim whether she had engaged in sexual intercourse with her boyfriend on the night of the alleged rape. The complainant answered that she had not. Nevertheless, petitioner argues that *Davis* requires that he be permitted to question the complainant further as to any previous sexual intercourse with her boyfriend, since such questioning "was probative of the existence of semen in the complainant."[3] (Pet. at 16) Such an argument ignores the initial inquiry and denial of any previous sexual intercourse on the evening in question.

Moreover, the presence of semen was not relevant or material in view of the defense theory presented at trial. Both petitioner and his co-defendants testified that the victim willingly consented to sexual intercourse. Thus, whether intercourse had occurred and whether semen was present was never at issue. The defense theory logically accounted for any presence of semen in the complainant. Further probing questions into prior sexual acts of the complainant would have been nothing more

[3] Petitioner argues that only when a defendant is permitted to bring out all possible probative evidence on cross-examination will a criminal trial be in constitutional compliance. Petitioner's argument ignores the procedural rules against the introduction of hearsay and opinion evidence, the rule that the scope of cross-examination may not exceed the limits of direct examination, and the threshold requirement for the admissibility of evidence—that its probative value outweigh any unfair prejudice. In each instance, evidence may be excluded even though it may tend to completely exonerate a defendant.

than a disguised attack on the character of the complainant having a substantial prejudicial effect—the likelihood that a jury exposed to such evidence would place the complainant on trial rather than determine the guilt or innocence of the accused.

Furthermore, evidence of the presence of semen, introduced by way of stipulation, was merely corroborative evidence of the commission of an act(s) of intercourse. It was not introduced, as petitioner claims, to prove the element of penetration. The positive, credible testimony of the victim was sufficient to convict the petitioner. *People v. Lewis*, 73 Ill. App. 3d 951, 392 N.E. 2d 701 (5th Dist. 1979). In fact, proof that the petitioner had sexual intercourse with the victim was not even necessary for a conviction of rape since petitioner was present at the commission of the rape, knew what was happening and did nothing to disassociate himself or to oppose it. *People v. Richardson*, 32 Ill.2d 412, 207 N.E. 2d 478, *cert. denied*, 384 U.S. 1201 (1965).

Even before the passage of the rape shield statute, Illinois courts had long recognized the irrelevancy of the questioning petitioner wished to pursue and had refused to permit a defendant to degrade and belittle a complainant in the eyes of the jury with probing questions into her prior consensual sexual activities. *People v. Bergin*, 74 Ill. App. 3d 58, 392 N.E.2d 1251 (1st Dist. 1979); *People v. Fink*, 59 Ill. App. 3d 51, 374 N.E.2d 1311 (2d Dist. 1974); *People v. Collins*, 25 Ill.2d 605, 186 N.E.2d 30 (1962), *cert. denied*, 373 U.S. 942 (1963).

The irrelevancy of petitioner's line of questioning has also been recognized by the federal courts and Congress with the passage of Rule 412 of the Federal Rules of Evidence. *Privacy of Rape Victims: Hearing on H.R. 14666 before the Subcomm. on Criminal Justice of the*

Committee on the Judiciary, 94th Cong., 2d Sess. at 14-15 (1976). In the leading Federal case on the issue, *United States v. Kasto*, 584 F.2d 268 (8th Cir. 1978), the Court found evidence of a complainant's specific prior acts of sexual intercourse with other men and evidence as to the fact that she was wearing an intrauterine contraceptive device at the time of the rape irrelevant to either her general credibility or to the issue of consent. 584 F.2d at 272; *See also Pratt v. Parrah*, 615 F.2d 486 (8th Cir.), *cert. denied*, 449 U.S. 852 (1980).

Courts have a duty to protect a witness from questions that go beyond the bounds of proper cross-examination in order to harass, annoy or humiliate a witness. *Alford v. United States*, 282 U.S. 687 (1931); *People v. Hanks*, 17 Ill. App. 3d 633, 307 N.E.2d 638 (1st Dist. 1974). The trial court fulfilled its duty when it properly applied the Illinois Rape Shield statute to exclude irrelevant questions which the defendant had no constitutional right to ask. *Davis v. Alaska*, 415 U.S. 308 (1974); *Rozell v. Estelle*, 554 F.2d 229 (5th Cir.), *cert. denied*, 434 U.S. 942 (1977). Therefore, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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February 2, 1983